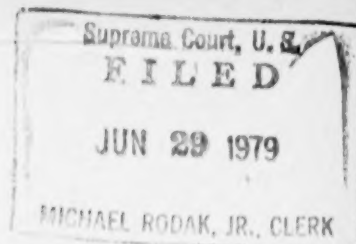


No. 78-1686



In the Supreme Court of the United States

OCTOBER TERM, 1978

PAUL W. HOFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1979. A petition for rehearing was denied on March 8, 1979 (Pet. App. B). Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including May 7, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for petitioner's arrest.

(1)

2. Whether the district court's sentencing of petitioner denied him due process.

STATEMENT

On April 11, 1978, a five count indictment was filed in the United States District Court for the Eastern District of New York charging petitioner and Brook Hart with violations of the federal narcotics laws. Petitioner's case was severed from Hart's. Prior to trial, petitioner moved to suppress cocaine seized from his luggage pursuant to a warrant as being the product of an illegal arrest. The district court held a hearing on the motion at which petitioner and the federal agents who had arrested him testified.

The evidence showed that at approximately 6:00 p.m. on February 20, 1978, customs officials at Kennedy Airport in New York contacted the airport DEA office and reported that they had found cocaine in the possession of Brook Hart, a passenger on Braniff Airlines flight 906 from Panama (A. 16a-17a, 126a-127a).¹ Hart immediately agreed to cooperate with the government and stated that he had received the two bags of cocaine taped to his legs from Paul Hoffman who, according to Hart, was also a passenger on flight 906. Hart stated that Hoffman also had cocaine taped to his legs (A. 21a-24a, 128a-129a). Hart provided the agents with a detailed physical description of Hoffman² and said that

¹"A." refers to the appendix filed in the court of appeals.

²Hart described Hoffman as (A. 26a):

a white male, approximately 30 years old, between 5'10", 5'11" in height, about 170 to 175 pounds in general weight, light brown hair, mod style not very long, but a mod cut, a mustache. He also described his wearing apparel [---] that he was wearing a three-piece gray pin-stripe charcoal gray pin-striped suit, a light or powder-type blue shirt, vested suit, that he was carrying some sort of an attache case or executive case and a raincoat or topcoat type of garment.

he was carrying a raincoat and briefcase and was traveling with a fold-over bag and a "solid type" suitcase (A. 26a, 130a). Hart also told the DEA agents that Hoffman intended to fly to San Francisco that evening (A. 29a, 131a).

The agents first checked the customs declarations for flight 906 and learned that a person named Paul Hoffman had been a passenger on that flight. Hoffman's declaration included a San Francisco area address (A. 27a, 129a-131a). Upon further investigation, the agents learned that three flights on three separate airlines were scheduled to leave for San Francisco in the next two hours (A. 29a-30a, 61a-63a).

The agents first visited the TWA terminal but failed to find Hoffman. They then went to the American Airlines terminal, where they saw petitioner, who matched the description given by Hart, walking toward the departure area for the flight to San Francisco (A. 31a, 70a-75a, 133a-134a, 157a-159a). The agents approached petitioner and asked if he was Paul Hoffman; petitioner denied that he was. The agents then identified themselves and again asked petitioner if he was Paul Hoffman. Once again, petitioner denied his identity. Finally, the agents asked petitioner for identification, and he withdrew from his pocket a passport bearing the name Paul Hoffman (A. 32a-34a, 77a-79a, 80a-82a, 135a, 160a-161a).³ In response to a question by the agents, petitioner denied knowing Hart (A. 34a, 100a, 135a-136a). At this point the agents arrested petitioner (A. 34a, 100a, 136a).

³One agent testified that when petitioner took out his passport the agent observed an airline ticket issued in the name of Paul Hoffman (A. 33a).

Following his arrest, petitioner asked permission to retrieve his fold-over bag from airline personnel. Petitioner denied having any other luggage (A. 35a, 101a, 136a). While on his way to recover the bag, petitioner "fumb[le]d with his fingers" under his raincoat (A. 35a-36a, 105a, 110a, 137a, 172a-175a). Soon thereafter petitioner, apparently on purpose, stumbled over a suitcase and dropped his airline ticket. A woman told petitioner that he had dropped his ticket, but petitioner denied that the ticket was his. One of the agents picked up the ticket and noticed that it bore petitioner's name and had a baggage claim ticket attached (A. 37a, 107a-108a, 110a-114a, 137a-139a, 174a-178a).

Upon arriving with petitioner at the DEA office, the agents, acting on Hart's information that petitioner also had cocaine taped to his leg, conducted a strip search. No cocaine was found, but the agents noticed a spot on petitioner's lower leg where hair had been removed and which contained a white gummy residue which indicated that adhesive tape had been removed.⁴ That area of petitioner's leg was reddened (A. 39a-41a, 140a-141a, 179a-182a). The agents later obtained a warrant to search the suitcase that petitioner had checked with the airline and found a bag containing one and a half kilograms of cocaine (A. 43a-44a).

The district court ruled that Hart's information, when corroborated by the agents' personal observations and coupled with petitioner's attempt to discard his ticket with the attached baggage claim check, constituted probable cause for petitioner's arrest. Finding the arrest proper, the

⁴A later search of the men's room in the American Airlines terminal yielded a discarded wad of surgical tape with strands of hair stuck to it (A. 45a-46a).

court ruled that the later search, pursuant to a warrant, was legal (A. 227a-232a).

After denial of his suppression motion, petitioner pleaded guilty to one count of the indictment charging him with illegal importation of cocaine, in violation of 21 U.S.C. 952(a) and 960(a)(1).⁵ Following petitioner's plea and upon examination of the pre-sentence report and materials submitted by petitioner on his own behalf, the district court sentenced petitioner to five years' imprisonment to be followed by a five year special parole term (A. 282a). The court of appeals affirmed (Pet. App. 14-15).

ARGUMENT

1. Petitioner contends (Pet. 10-12) that the information in the agents' possession at the time of his arrest was insufficient to constitute probable cause. He argues that neither the district court nor the court of appeals tested the information against the standards enunciated in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), but instead improperly relied on a line of Second Circuit cases⁶ that, he asserts, erroneously hold that the standards of *Aguilar* and *Spinelli* are inapplicable to cases in which the information is supplied by a participant informant.

Initially, we note that the record does not support petitioner's assertion regarding the basis for the decisions of the courts below. The district court merely held that

⁵Petitioner, with the government's consent, reserved the right to challenge the district court's suppression ruling on appeal (A. 248a). The other counts (conspiracy to import cocaine and possession of cocaine with intent to distribute) were dismissed on the government's motion (A. 283a).

⁶See *United States v. Rueda*, 549 F. 2d 865 (2d Cir. 1977); *United States v. Miley*, 513 F. 2d 1191 (2d Cir.), cert. denied, 423 U.S. 842 (1975).

the information provided by Hart, when corroborated by the agents' observations and questioning of petitioner, was sufficient to establish probable cause. In fact, the district court noted that Hart's reliability was in "substantial question * * * in th[e]se circumstances" (A. 227a), but it nonetheless found probable cause based on all the considerations mentioned above (A. 227a-231a).

In any event, it is clear that the information at the agents' disposal was sufficient to satisfy the *Aguilar-Spinelli* requirements that an informant's allegation of illegal conduct be supported by underlying circumstances and information from which it can be concluded that the informant is reliable or his information is credible. *Spinelli v. United States*, *supra*, 393 U.S. at 413. Hart told the agents in detail of petitioner's actions in enlisting Hart as a courier, their trip to Panama where petitioner obtained the cocaine and taped it to Hart's and his own legs, and their plan to transport the drugs to San Francisco for resale (A. 23a-24a). The agents corroborated Hart's detailed description of petitioner and the raincoat and briefcase he was carrying. See *Draper v. United States*, 358 U.S. 307 (1959). Additionally, we note that Hart's statements regarding his dealings with petitioner were against his own penal interest, since they implicated him in a conspiracy with petitioner. See *United States v. Harris*, 403 U.S. 573, 583 (1971).

The information known to the agents thus was adequate to meet the *Aguilar-Spinelli* test. Beyond this, however, is the fact that petitioner, when approached as he was proceeding to the flight to San Francisco, denied his identity and his acquaintance with Hart. Yet the passport he produced had his name on it. Petitioner's action, when coupled with Hart's detailed and corroborated tip, unquestionably gave the agents probable cause to arrest him.

2. Petitioner contends (Pet. 5-9) that he was denied due process because the district court, in determining his sentence, relied on hearsay information in which Hart implied both that petitioner was the more culpable of the two and that petitioner had participated in prior illegal transactions. Petitioner alleges that these allegations are false.

Once again, the record belies petitioner's claim. The district court refused to be drawn into "speculating" whether petitioner or Hart was more culpable (A. 281a). The only basis for the court's decision to impose a heavier sentence on petitioner⁷ was that Hart cooperated with the government and petitioner did not (*ibid.*). Moreover, the court declined to rely on information (not from Hart) that petitioner had been involved in previous illegal conduct (A. 276a; see A. 281a). Because the judge did not base the sentence on the information that petitioner disputed, petitioner's assertion that he was denied due process by his inability to challenge that information is insubstantial. See *United States v. Harris*, 558 F. 2d 366, 374 (7th Cir. 1977).

A district court has broad discretion to consider a wide range of information concerning the defendant, including hearsay information, in imposing sentence. *United States v. Grayson*, 438 U.S. 41, 50 (1978); *United States v. Tucker*, 404 U.S. 443, 446 (1972); *Williams v. New York*, 337 U.S. 241, 247, 250 (1949). The judge's decision to take into consideration Hart's cooperation with the government is not challenged by petitioner, nor could it be. See

⁷Hart likewise pleaded guilty to a single importation count and was sentenced to 18 months' imprisonment plus a three year special parole term (A. 267a).

United States v. Stevenson, 573 F. 2d 1105 (9th Cir. 1978); *United States v. Williams*, 499 F. 2d 52 (1st Cir. 1974).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JUNE 1979